No. 15,841

IN THE

United States Court of Appeals

For the Ninth Circuit

JOGINDAR SINGH CLAIR,

Appellant,

vs.

BRUCE G. BARBER, as District Director, Immigration and Naturalization Service, San Francisco District,

Appellee.

On Appeal from the United States District Court for the Northern District of California.

BRIEF OF APPELLEE.

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Subject Index

Table of Authorities Cited

Statutes

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BRIEF OF APPELLEE.

JURISDICTION.

Appellant by his complaint herein sought judicial review of the administrative disposition of his application for suspension of deportation. Traditionally, habeas corpus was the remedy whereby such relief was sought.

Jay v. Boyd, 351 U.S. 345;

Hintopoulos v. Shaughnessy, 353 U.S. 72.

The Supreme Court has approved the declaratory judgment action, 28 U.S.C. 2201, as proper to obtain

a judicial determination of eligibility for the exercise of the discretion.

McGrath v. Kristensen, 340 U.S. 162;
Ceballos v. Shaughnessy, 352 U.S. 599.

Ceballos is also authority for the proposition that the Attorney General is not an indispensable party, following *Shaughnessy v. Pedreiro,* 349 U.S. 48.

To the extent that the exercise of discretion may be reviewed, it would appear the same relief may be obtained by habeas corpus or by a complaint for review and declaratory relief.

Crain v. Boyd, 237 F. 2d 927;
Brownell v. Tom We Shung, 352 U.S. 180;
Leonard Cruz-Sanchez v. Robinson, 249 F. 2d 771;
Rystad v. Boyd, 246 F. 2d 246, cert. den. 1-7-58, 355 U.S. 912;
Wolf v. Boyd, 238 F. 2d 249, cert. den. 4-13-57, 353 U.S. 936.

STATEMENT OF THE CASE.

Appellant, a citizen of India, entered the United States on August 27, 1940, as a seaman on shore leave. He was then a member of the crew of a vessel of British registry. He failed to return to the vessel and has remained in the United States unlawfully since August 27, 1940. He has been found deportable on the ground that he was an immigrant without a visa at the time of his entry into the United States. His deportability on this ground is not challenged.

In the course of his hearing he made application for suspension of deportation under Section 244(a)(1) of the 1952 Immigration and Nationality Act (8 U.S.C. 1254(a)(1)). The special inquiry officer denied the application with the following statement:

> "It is to be noted that the respondent deserted an allied ship during a period when the United States was endeavoring to aid Great Britain during World War II and when every available seaman was sorely needed."

On appeal, the Board of Immigration Appeals restated the statement of the special inquiry officer as follows:

> "This relief was denied by the Special Inquiry Officer . . . because the respondent came into the United States on an allied merchant vessel during the war, left his ship and did not engage in seaman service during the remainder of hostilities."

STATUTES.

Section 244(a)(1) Immigration and Nationality Act of 1952. (8 U.S.C. 1254(a)(1)).

> "Sec. 244(a) As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien who—
>
> (1) Applies to the Attorney General within five years after the effective date of this chapter for suspension of deportation; last entered the United States more than two years prior to June

27, 1952; is deportable under any law of the United States and is not a member of a class of aliens whose deportation could not have been suspended by reason of section 19(d) of the Immigration Act of 1917, as amended; and has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application, and proves that during all of such period he was and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in exceptional and extremely unusual hardship to the alien or to his spouse, parent or child, who is a citizen or an alien lawfully admitted for permanent residence; . . ."

* * *

Section 244(b), Immigration and Nationality Act of 1952. (8 U.S.C. 1254(b)).

"(b) Upon application by any alien who is found by the Attorney General to meet the requirements of paragraphs (1), (2), or (3) of subsection (a) of this section, the Attorney General may in his discretion suspend deportation of such alien. If the deportation of any alien is suspended under the provisions of this subsection, a complete and detailed statement of the facts and pertinent provisions of law in the case shall be reported to the Congress with the reasons for such suspension. Such reports shall be submitted on the first and fifteenth day of each calendar month in which Congress is in session. If during the session of the Congress at which a case is reported, or, prior to the close of the session of the Congress next following the session at which

a case is reported, either the Senate or the House of Representatives passes a resolution stating in substance that it does not favor the suspension of such deportation, the Attorney General shall thereupon deport such alien or authorize the alien's voluntary departure at his own expense under the order of deportation in the manner provided by law. If neither the Senate nor the House of Representatives shall, within the time above specified, pass such a resolution, the Attorney General shall cancel deportation proceedings. The provisions of this subsection relating to the granting of suspension of deportation shall not be applicable to any alien who is a native of any country contiguous to the United States or of any adjacent island, unless he establishes to the satisfaction of the Attorney General that he is ineligible to obtain a nonquota immigrant visa."

QUESTION.

Is the exercise of discretion by the Board of Immigration Appeals subject to judicial review?

ARGUMENT.

THE BOARD OF IMMIGRATION APPEALS HAS PROPERLY EXERCISED THE DISCRETION REQUIRED BY SECTION 244 (a)(1), AND ITS DECISION MAY NOT BE REVIEWED.

Appellee does not accept the proposition asserted by appellant as "the clear tenor of the decided cases".

The decided cases to which he refers include the following:

Kaloudis v. Shaughnessy (2 Cir.), 180 F. 2d 489;

Wolf v. Boyd (9 Cir.), 238 F. 2d 249, cert. den. 4-23-57, 353 U.S. 936;

Jay v. Boyd, 351 U.S. 345;

Hintopoulos v. Shaughnessy (2 Cir.), 233 F. 2d 705, affirmed 353 U.S. 72.

The opinion in the *Kaloudis* case was written by Chief Judge Learned Hand of the Second Circuit with the concurrence of Judges Swan and Chase. In *Wolf v. Boyd* of this Court, the opinion was written by Judge Barnes. Chief Judge Denman and Judge Bone joined without dissent.

The opinion in the *Wolf* case, pages 254-255, embraces a substantial portion of the opinion in the *Kaloudis* case by quotation. The following portions of the quotation are noted:

> "The interest which an alien has in continued residence in this country is protected only so far as Congress may choose to protect it; Congress may direct that all shall go back, or that some shall go back and some may stay; and it may distinguish between the two by such tests as it thinks appropriate. . . . and, if the relator has the privilege of inquiring into the grounds, he has been wronged, and the writ should have gone. An alien has no such privilege; unless the ground stated is on its face insufficient, he must accept the decision, for it was made in the 'exercise of discretion', which we have again and again declared that we will not review.

> . . . The power of the Attorney General to suspend deportation is a dispensing power, like a judge's power to suspend the execution of a sentence, or the President's to pardon a convict. It is a matter of grace, over which courts have no review, unless—as we are assuming—it affirmatively appears that the denial has been actuated by considerations that Congress could not have intended to make relevant. . . ."

In *Jay v. Boyd* (supra), the Supreme Court on page 354, footnote 16, quoted the following from Judge Hand's opinion in *Kaloudis:*

> "As stated by Judge Learned Hand, 'The power of the Attorney General to suspend the deportation is a dispensing power like a Judge's power to suspend the execution of a sentence, or the President's to pardon a convict.' "

From the same page (354) of the *Jay* case, the following was quoted in the opinion of the Court below (Tr. p. 21):

> "It (the statute) does not restrict the considerations which may be relied upon or the procedure by which the discretion should be exercised, although such aliens have been given a right to a discretionary determination on an application for suspension. Cf. *Accardi v. Shaughnessy,* 347 U.S. 260, a grant thereof is manifestly not a matter of right, under any circumstances, but rather is in all cases a matter of grace. Like probation or suspension of criminal sentence, it 'comes as an act of grace', *Escoe v. Zerbst,* 295 U.S. 490, 492, and 'cannot be demanded as a right', *Berman v. U. S.,* 302 U.S. 211, 213, and this unfettered discretion of the Attorney Gen-

eral with respect to suspension of deportation is analogous to the Board of Parole's powers to release federal prisoners on parole."

Appellant here relies heavily upon the Second Circuit Court of Appeals' opinion in *Mastrapasqua v. Shaughnessy*, 180 F. 2d 999, decided about two weeks after *Kaloudis*. The panel of judges consisted of Augustus N. Hand, Chase and Frank. Judge Frank wrote the opinion of the Court. *Mastrapasqua's* application for suspension of deportation had been denied by the Board of Immigration Appeals in the following language:

> "The case is one squarely within the terms of the decision of the Attorney General in the *Lagamarsino* case and accordingly he cannot be granted the privilege of applying for suspension of deportation. The motion must therefore be denied." (p. 1001)

In the *Lagamarsino* case the Attorney General refused to legalize *Lagamarsino's* residence in that he was a seaman whose presence in the United States was the result of conditions arising out of World War II. Judge Frank (p. 1003) concluded:

> ". . . It seems clear that the Attorney General was acting in accordance with a 'policy' of refusing to consider whether or not to give discretionary relief of pre-examination to any persons coming within a fixed category, i.e.—those whose presence in the United States is due solely to war. It is also clear that the Board felt constrained by the *Lagamarsino* decision to apply the 'policy' based on this classification to *Mastrapasqua's* re-

quests for first pre-examination, and later suspension of deportation."

The case was remanded to the Immigration and Naturalization Service to exercise discretion.

Cf. *Accardi v. Shaughnessy,* 347 U.S. 260; *Shaughnessy v. Accardi,* 349 U.S. 280.

Appellant's position in reliance on *Mastrapasqua* is somewhat akin to Judge Frank's dissent in *Hintopoulos v. Shaughnessy,* 233 F. 2d 705, 709. The majority opinion written by Judge Hincks, concurred in by Judge Waterman, distinguished *Mastrapasqua* as a case in which the Board had failed or refused to exercise its discretion. In *Hintopoulos,* the Board had found him (Hintopoulos) eligible and "in the exercise of its discretion it denied the suspension applied for." (p. 708.) The Court then held that in its broad power in the formulation of its discretion the Board might properly take into account, among other factors, its concept of congressional policy as manifested in the 1952 Act. In so doing it relied on *Kaloudis v. Shaughnessy* (supra).

Judge Frank in his dissent pointed out that his "colleagues lean heavily on *United States ex rel Kaloudis v. Shaughnessy.*" His position was that *Hintopoulos* was like *Mastrapasqua.*

The Supreme Court affirmed the majority opinion in *United States ex rel. Hintopoulos v. Shaughnessy,* 353 U.S. 72. The Court said, page 77:

"The Board found that petitioners met these standards and were eligible for relief. But the

statute does not contemplate that all aliens who meet the minimum legal standard will be granted suspension. Suspension of deportation is a matter of discretion and of administrative grace, not mere eligibility. Discretion must be exercised even though statutory prerequisites have been met."

United States ex rel. Kaloudis v. Shaughnessy, 180 F. 2d 489;

United States ex rel. Adel v. Shaughnessy, 183 F. 2d 371;

Cf. *Jay v. Boyd,* 351 U.S. 345.

CONCLUSION.

It appears clearly in the case at bar that the appellee and the Board of Immigration Appeals have exercised the discretion vested in the Attorney General under Section 244 of the Immigration and Nationality Act of 1952 (8 U.S.C. 1254(a)(1)) and have denied to appellant the relief sought by his application for suspension.

The position of appellant, a seaman, who entered the United States on shore leave as a member of the crew of a British vessel in 1940, who thereupon deserted his ship and remained in the United States illegally, who thereafter "did not engage in seaman service during the remainder of hostilities" constitutes a sufficient reason on its face, in the exercise of the discretionary function, to deny the application.

It is respectfully submitted that in a valid exercise of the discretion contained in Section 244, the application of appellant was denied. The judgment of the District Court should be affirmed.

Dated, April 3, 1958.

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